

TEORIA E CRITICA DELLA REGOLAZIONE SOCIALE 2/2017

Questo numero della rivista dà conto del dibattito sui rapporti tra Law and Humanities e metodologia clinica, promosso in collaborazione con la *Italian Society for Law and Literature* (ISLL), in occasione del Convegno mondiale dell'*International Association for the Philosophy of Law and Social Philosophy* (IVR), svoltosi a Lisbona nel 2017. Trovando una radice filosofica comune nel realismo americano e nel conseguente allontanamento dal dogmatismo e dal formalismo tipici del 1900, *Law & Humanities* e *Legal Clinics* condividono ideali e fini comuni. Essi tuttavia sono distanti nei metodi. Lo scopo del workshop, i cui atti sono raccolti in questo volume, era di riscoprire sinergie tra i due movimenti gettando un ponte tra teoria e pratica. Nel far ciò, esso ha voluto richiamare l'attenzione sulla specificità del dibattito che va sviluppandosi in Europa, e in particolare in Italia, sul tema delle cliniche legali.

Flora Di Donato and Paolo Heritier,
Introduction

Carla Faralli,
American Realism's New Proposals for Legal
Education: Legal Clinics and Law & the
Humanities

Enrico Buono,
"Our Forgotten Tradition". The Neglected Role
of Continental Legal Culture in the Parallel
Evolution of the Law & Humanities and Legal
Clinics Movements

Angela Condello,
Trajectories and Future Perspectives in Law and
Humanities

Flora Di Donato,
How to Increase the Role of Vulnerable People
in Legal Discourse? Possible Answers from
Law & Humanities and Legal Clinics: Teaching
Experiences from Italy & from Switzerland

Brisa Paim Duarte,
Law's Practical Realization among Narration,
Translation, Performance, and Imagination:
A Symbolic Reassurance of "Juridical"
Singularity?

Alberto Scerbo,
Gli sguardi vuoti di Modigliani: per una lettura
"pittorica" della rappresentazione del "giuridico"

Testimonianze

Maurizio Veglio,
Tales from Another World

Recensioni

Flavia Monceri, *Etica e disabilità*, Morcelliana,
Brescia 2017
by Virginia Bilotta

Fabio Ciarraelli, *Il dilemma di Antigone*,
Giappichelli, Torino 2017
by Jacopo Ricca

Guglielmo Siniscalchi, *Il barocco giuridico. Osservatori, osservanti, spettatori*,
Franco Angeli, Milano 2017
by Enrico Cassini

Pierangelo Sequeri, *Il sensibile e l'inatteso. Lezioni di estetica teologica*,
Queriniana, Brescia 2016
by Giorgio Macaluso

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LAW AND HUMANISTIC METHODOLOGY

A CURA DI FLORA DI DONATO E PAOLO HERITIER

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della Regolazione Sociale**



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DIRITTO E METODOLOGIA UMANISTICA
Humanities and Legal Clinics.
Law and Humanistic Methodology**

A cura di
Flora Di Donato e Paolo Heritier

Con il sostegno dell'Associazione Polis all'attività del Centro Studi di Teoria e Critica della Regolazione Sociale

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Indice

Flora Di Donato and Paolo Heritier,

Introduction

p. 9

Carla Faralli,

American Realism's New Proposals for Legal Education:
Legal Clinics and Law & the Humanities

p. 11

Enrico Buono,

"Our Forgotten Tradition". The Neglected Role of Continental Legal Culture in the Parallel
Evolution of the Law & Humanities and Legal Clinics Movements

p. 17

Angela Condello,

Trajectories and Future Perspectives in Law and Humanities

p. 27

Flora Di Donato,

How to Increase the Role of Vulnerable People in Legal Discourse? Possible Answers from
Law & Humanities and Legal Clinics: Teaching Experiences from Italy & from Switzerland

p. 35

Brisa Paim Duarte,

Law's Practical Realization among Narration, Translation, Performance, and Imagination:
A Symbolic Reassurance of "Juridical" Singularity?

p. 55

Alberto Scerbo,

Gli sguardi vuoti di Modigliani:
per una lettura "pittorica" della rappresentazione del "giuridico"

p. 71

Testimonianze

Maurizio Veglio,
Tales from Another World
p. 85

Recensioni

Flavia Monceri, *Etica e disabilità*, Morcelliana, Brescia 2017
by Virginia Bilotta
p. 95

Fabio Ciaramelli, *Il dilemma di Antigone*, Giappichelli, Torino 2017
by Jacopo Ricca
p. 99

Guglielmo Siniscalchi, *Il barocco giuridico. Osservatori, osservanti, spettatori*,
Franco Angeli, Milano 2017
by Enrico Cassini
p. 103

Pierangelo Sequeri, *Il sensibile e l'inatteso. Lezioni di estetica teologica*,
Queriniana, Brescia 2016
by Giorgio Macaluso
p. 107

Introduction

This special issue of *Teoria e critica della regolazione sociale* is a collection of the proceedings of the 2017 *World Congress of the International Association for the Philosophy of Law and Social Philosophy* – Special Workshop on *Law & Humanities and Legal Clinics* – organized in collaboration with the *Italian Society for Law and Literature (ISLL)*. The aim of the Special Workshop – coordinated by Carla Faralli, Flora Di Donato and Paolo Heritier – was to collect and discuss contributions exploring the possible links between Law and Humanities and Legal Clinics.

By launching the call for paper, we moved from the awareness that Law & Humanities and Legal Clinics share common features: they both recognize the need to break away from a formal, dogmatic and academic approach to law, also given their common roots: American Realism. Over the course of the twentieth century, they have given birth to new modes of learning based on studying the law in action, from a cross-disciplinary perspective that encourages us to think about the law in ways otherwise unexplored. Despite this overlap, we have the impression that Law & Humanities and Legal Clinics do not engage each other in any direct exchange: while the former tends to emphasize theory, the latter is distinctly practical. Thus, the workshop was aimed at examining ways in which these two movements can support each other by crafting epistemological and methodological tools pertinent to both, to this end using not only the case method but also, and crucially, the analytical techniques of argumentation and legal storytelling, while also investigating any other form of human expression (i.e. visual arts), which may contribute to understanding the law.

On this basis, we collected seven interesting contributions aimed at discovering the American as well as the European roots of Clinical Legal Education and tracing some connections with the Law and Humanities approach.

“Before the law there is humanity” – this sentence may be adopted as the “*fil rouge*”, the message that link together all contributions. The first contribution is from Carla Faralli, coordinator of the *Italian Society for Law and Italian Society (ISLL)* and President of the *Società Italiana di Filosofia del Diritto (SIFD)*. Faralli situates his argument within American Legal Realism by putting emphasis on the clinical method envisioned by Jerome Frank since 1930s as an antidote to Langdell’s formalism. She finds in Jerome Frank’s thinking – who conceived the law as a form of art, performed as music, painting and so on – a common starting point for both movements: Law and Humanities and Legal Clinics. In so doing, she puts emphasis on the humanities as parts of the jurists’ training to develop critical thinking. She then recalls parallel reflections about clinical legal education that happened in Italy since 1930s thanks

to a jurist such as Cernelutti who stressed the importance of a practical approach to law as well as the social role of legal clinics.

A similar pathway is proposed by Enrico Buono, who reconstructs an articulated framework of the European and Italian roots of clinical legal education drawing mostly on the works of Italian jurists – such as Giovanni Brunetti, Roberto Vacca, Antonio D’Amato and others. Those authors found in literature a source of inspiration to understand the social and human nature of law. Their aim was to resist formalism. Buono also recalls the efforts of Cernelutti in Italy and Bonnacase in France which drove law schools towards a more lively method of teaching law. While Cernelutti criticized the “absurdity” of becoming a lawyer “without ever having seen a living case of law”, Bonnacase proposed a retrospective method aimed at “describing and analysing what has happened” (p. 21). Thus, jurists such as Calamandrei, Cernelutti and Cogliolo are defined by Buono as “men of the Renaissance”, as in their seminal works, the jurist and the writer perfectly coexist.

The contribution of Angela Condello, in turn, deals with methodological reflections about law as a system of normativity characterized by abstraction and generality attached to – but also detached from – social relations. By pointing out that “before the law there is humanity”, Condello is aware that norms serve to adapt to the external environment as they establish regularity and in so doing they provide foundational characteristic for human life. In order to establish an equilibrium between two poles – human beings on one hand and abstract rules on the other – she advocates for enjoying the opportunity offered by legal clinics to work on cases. Cases analysis would be enriched with the study of literature, working for example from and within the perspective of the excluded. She recalls the words of White who refers to the law not as system of rules but as a language, a habit of mind, in other words a “culture”. As such, it can oppress or protect, it can grant or deny rights. Finally, Condello argues that a critical overview of the law is possible by conceiving law and humanities as a method to “capture the impact, the compliance and the effectiveness of law on social change in an innovative way” (p. 32).

Then Flora Di Donato, in part reconstructing the American roots of Clinical Legal Education – especially referring to the second part of diffusion of this movement since the 1970’s – puts emphasis on some topics of clinical legal education. One of these is the relationship between client and lawyer – explored as a rapport of collaboration and collective story construction. She provides examples of cases analysed within the framework of clinical courses that she held in Switzerland and in Italy. One of the Swiss cases is about the protection of foreign women who are victims of domestic violence and who are helped by social workers which provide social and legal assistance to the victims. She shows the tensions around the interpretation of the legal framework by the federal authorities to establish the right of those women to be granted permission to stay in Switzerland. Di Donato argues for the opportunity of actively involving client in the process of story construction, thereby developing legal clinics as socio-legal spaces for case resolution among lay and expert actors. She also provides a short account of the incoming Neapolitan legal clinics.

A methodological reflection is also proposed by Brisa Paim who raises questions about the interdisciplinary and plurality of voices about legal discours. She focuses

on the role of judicial interpretation meant as performance. Legal texts become living texts when executed and played out. She then recalls the hermeneutic assumption of the “law-as-interpretation” as being at the core of the law and literature Movement. Raw texts require creativity to acquire meaning. Towards this aim, she evokes different positions and models of interpretation such the ones proposed by White, Manderson and Ost. In particular, by quoting Manderson, she focuses on aesthetics as an experience of understanding, “a way of knowing and being”. Paim concludes that translation is a new multilingual bridge among disciplines.

Finally, Maurizio Veglio in providing a testimony about the Human Rights and Migration Law Clinic (HRMLC) established at the International University College of Turin, underlines the function of storytelling in supporting claims for international protection. The stories must be plausible and credible according to the legislative framework. This demands a big effort for asylum seekers to “describe back” their stories and to clinical students to convert them in legal narratives. In so doing they become “speechless emissaries” of suffering (Malkki, 1996). Even if narratives from asylum seekers are not meant as pieces of arts – concludes Veglio – they “visually transpose the reader into worlds of different shape, beliefs, sounds, behaviours, embarking in the most ambitious journey of distancing from one’s perspective” (p. 91). In turn “adjudicator and asylum seeker take a waltz on a stage where borders between real and fictional evaporate, leaving the floor to ‘alternative truths’”.

Last but not least, Alberto Scerbo describes Modigliani’s conception of art as a way to penetrate the mystery of human beings. This painter doesn’t try reproduce reality as the impressionists did, for example, but he tries to figure out the essence of human nature. The pluralism of artistic styles at Modigliani’s time – at the beginning of 1900 – is an expression of the attempts to look for alternative forms of social expression, opposite to bourgeoisie. In contradiction to the values of objectivity and rationalism that dominated the 1800s, is the discovery of subjectivism. Public and private dimensions go together. Legal rules are dissolved within society, according to Santi Romano’s conception, for example. Art is intended to create new realities. Scerbo proposes an analogy with the legal realism to explain the philosophical message of Modigliani. Realism looks toward a single case and to concrete reality to give life and content to legal rules and in so doing it deals with subject and object, singular and universal. Modigliani does the same attempt to deal the interiority and the exteriority of human beings. This transpires through the technique of the slight deformation of faces, the stylization of strokes, the lengthening of shapes and the empty looks. Thus, the suffering and the most hidden characters emerge on the surface. Reality is combined with unreality to give shape to the absolute.

Co-editors thank the authors for their fascinating contributions that are testimony to the attempts to look for new alternative ways of interpreting and doing law in a critical way. A way that definitively takes seriously in account human beings, their suffering, weaknesses, and resistances. In the meantime, they provide a testimony of the pluralistic efforts currently being conducted in Europe and especially in Italy to translate clinical legal education in a critical way by adapting it to the cultural richness of our traditions.

Flora Di Donato & Paolo Heritier

